United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7256

To be argued by
LEONARD OLARSCH

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MHG ENTERPRISES, INC., JAY PLAYLAND CORP., I. G. AMUSEMENT CORP., G & G RIDE CORP., J.M.P. ENTERPRISE, INC., RON LAMBARDI & GLEN PERRY d/b/a EASTERN AMUSEMENT, THE GREAT ADVENTURE AMUSEMENT PARK, INC., ONASSIS AMUSEMENTS, INC., MICHAEL ESPOSITO d/b/a AMERICAN ZOO, LOUIS ROMANO d/b/a PONY WHEEL, E.B. ANDERSON d/b/a ANDERSON AMUSEMENTS, APPOLLO AMUSEMENTS, INC., R.M.J. AMUSEMENTS, INC., K & J AMUSEMENTS, INC., RENNEBECK AMUSEMENT SERVICE CO., LTD.

Plaintiffs-Appellants.

-against-

NEW YORK CITY PUBLIC DEVELOPMENT CORPORATION, THE CITY OF NEW YORK, and, THE SHERIFF OF THE CITY OF NEW YORK,

Defendants-Appellees.

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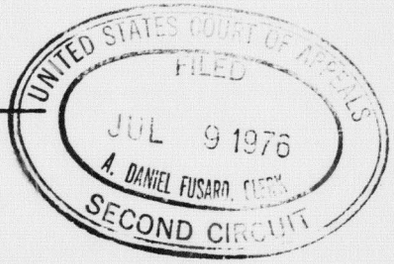

APPELLEES' BRIEF

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UNITED STATES COURT OF APPEALS
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MHG ENTERPRISES, INC., JAY PLAYLAND CORP., I.G. AMUSEMENT CORP., G & G RIDE CORP., J.M.P. ENTERPRISE, INC., RON LAMBARDI & GLEN PERRY d/b/a EASTERN AMUSEMENT, THE GREAT ADVENTURE AMUSEMENT PARK, INC., ONASSIS AMUSEMENTS, INC., MICHAEL ESPOSITO d/b/a AMERICAN ZOO, LOUIS ROMANO d/b/a PONY WHEEL, E.B. ANDERSON d/b/a ANDERSON AMUSEMENTS, APPOLLO AMUSEMENTS, INC., R.M.J. AMUSEMENTS, INC., K & J AMUSEMENTS, INC., RENNEBECK AMUSEMENT SERVICE CO., LTD.,

Plaintiffs-Appellants,

-against-

NEW YORK CITY PUBLIC DEVELOPMENT CORPORATION, THE CITY OF NEW YORK, and THE SHERIFF OF THE CITY OF NEW YORK,

Defendants-Appellees.

APPELLEES' BRIEF

STATEMENT

Appellants, former operators of an amusement park on land condemned by the City of New York for a public purpose, appeal from an order of the United States District Court for the Eastern District of New York (Costantino, J.), entered May 26, 1976, vacating a temporary restraining order and dismissing appellants' amended complaint seeking repossession of the condemned property.

ISSUES PRESENTED

1. Is appellants' action barred under the doctrine of res judicata?

2. Assuming that the complaint should be read as based on acts alleged to have occurred subsequent to the State Courts' determination, and thus the action not barred by res judicata, are such acts nevertheless insufficient to confer federal jurisdiction?

FACTS

(1)

Plaintiffs-appellants operated an amusement park partly on City-owned land and partly on their own land. A portion of the City land was held by plaintiffs under a 30-day permit and the balance of this City land was occupied by them without permission (29). In 1972, the City terminated any interest plaintiffs had in the City-owned land by condemning it for a public improvement and in 1974 also condemned plaintiffs' fee owned land for the same purpose (College Point Industrial Park Urban Renewal Project) (id.)

In September 1974, the City moved in Supreme Court, Queens County, for a Writ of Assistance to compel plaintiffs to remove their amusement rides and surrender possession of the land in order to enable the City of New York through its agent, the Public Development Corporation (PDC), to proceed with the public improvement for which the land had been acquired (30).

On March 10, 1975, plaintiffs agreed through counsel, by written stipulation with court approval,

that, inter alia, if they were permitted to operate the amusement park through the 1975 season and the City agreed to expedite the trial to determine whether plaintiffs' rides (those located on the former City-owned land only) were unacquired personalty or compensable fixtures and, if fixtures, their value, plaintiffs would remove the amusement rides and surrender possession of the land at the end of the 1975 amusement park season (30).

The stipulation provided that (44):

> "without further notice or order of this Court, that they [appellants] herewith agree to discontinue and cease operations, maintenance and use of all such facilities and to quit same at the close of the amusement park season in the Autumn of 1975 but in no event later than November 1, 1975."

Appellants also agreed that the order of possession was to be "peremptory" against them and that they would "not request, either by motion, order to show cause or otherwise, any further extension of time to quit said lands under the terms of the Stipulation as hereinabove indicated and as described in the Order of Possession" (45).

Appellees agreed "not [to] remove or disturb..." the rides on the former City land "until after May 5, 1975..." and, as to the other rides, not until appraisals had been completed (43, 44). On the same date, a consent order of the Court embodying the agreement of

the parties was entered (Stipulation and Order [38-40]).

The City kept its end of the bargain. Plaintiffs completed the 1975 amusement park season and the fixture trial concerning the rides on the former City-owned land was had, resulting in a finding that the amusement rides were portable non-compensable personal property (55-56).

We will not here recount the numerous stays of possession obtained by plaintiffs in almost every manner imaginable after they completed the 1975 amusement park season.* Reduced to basics, appellants appealed from an order of the Supreme Court granting the City possession on the basis of appellants' agreement to vacate. The Appellate Division unanimously affirmed the order and remanded the proceeding for the purpose of fixing a new date by which appellants would be required to vacate, which the lower court did (140-144, 153-156).

Plaintiffs filed a notice of appeal from the unanimous affirmance of the Appellate Division, which appeal was dismissed by the Court of Appeals, sua sponte, on the ground that, contrary to plaintiffs' contention in its papers and brief submitted to that Court, "no substantial constitutional question is directly involved." That Court also vacated

*See, In Re City of New York (College Point Industrial Park Urban Renewal Project 2), NYLJ, July 6, 1976, p. 11, Col. 4 (Sup. Ct., Queens Co., Castaldi, J.) for a partial recitation of this chronology.

all existing court ordered and automatic stays as being academic. (145).

(2)

On April 30, 1976, appellants commenced this action in the District Court by service of a complaint asserting, as they had in the State courts, that because of the City's fiscal problems, if payment of the award did not precede surrender of possession, an unconstitutional taking would result (6, 9). On the same date, appellants obtained a temporary restraining order enjoining the City from taking possession of the condemned property and an order to show cause as to why a preliminary injunction should not be granted (1).

The appellees, on May 7, 1976, cross-moved for an order dismissing the action, and requested that the City be put back into possession immediately (37). They asse[illegible] that the claimed constitutional question having been determined in the State Courts precluded federal jurisdiction (31-33). They also noted appellants' failure to inform the District Court that the City had already made an advance payment of award for the former fee-owned land in the sum of $1,068,712.33 and that appellants owed the City over $120,000 in rent arrears for occupancy of the City land, which ultimately would be deducted from the award if sufficient money remained after satisfaction of many prior liens (34).

(3)

On May 11, 1976, appellants served an amended complaint, the dismissal of which is the subject of this appeal, further alleging that because the City had refused to pay relocation expenses for removal of appellants' amusement rides while other condemnees had received such payment, appellants were being denied equal protection (7). At the time, an Article 78 proceeding was pending in State Supreme Court for such relocation expenses, which proceeding has been dismissed because of appellants' failure to exhaust administrative remedies in the Department of Relocation. Matter of MHG Enterprises Inc. (City of New York), NYLJ, June 11, 1976, p. 7, col. 2 (Sup. Ct., N.Y. Co., Tierney, J.).

In the amended complaint, appellants accused the appellees of engaging in a conspiracy to compel them to forfeit their amusement rides without compensation (8). This "conspiracy" consisted of allegations that the City refused to pay relocation expenses, and had made malicious complaints to the Health and Buildings Department about the safety of the rides and improper practices at the park and that the Buildings Department had refused to renew appellants' assembly permit (7-8).

It is this claimed conspiracy which appellants allege gives rise to federal jurisdiction under 28 U.S.C §§1331, 1343 and 42 USC §1983 (App. Br., p 2). The only relief requested in the amended complaint

is that appellants be put back into possession until compensation is paid (9). At present, the City is in possession of the property, appellants' motion to this court for such relief, pendente lite, having been denied on May 29, 1976. Appellants, concurrently with this appeal, moved for such relief in State Court, which motion was denied. In Re City of New York (College Point Industrial Park Urban Renewal Project 2), supra, NYLJ July 6, 1976, p. 11, col. 4 (Sup. Ct., Queens Co., Castaldi, J.). They also moved in State Court for a stay maintaining the status quo, which motion is presently pending. In Re College Point Industrial Park Urban Renewal Project II (In Borough of Queens), NYLJ, July 6, 1976, p. 11, Col. 5. On June 18, 1976, however, a stay directing maintenance of the status quo pending such determination was granted and is still in effect.

THE DECISION BELOW

The District Court dismissed the amended complaint and refused to enjoin the City from taking physical possession of the property on the ground that its right to possession, having been determined in the State Courts, was res judicata (194).

ARGUMENT

THE CITY'S ABSOLUTE RIGHT TO IMMEDIATE POSSESSION OF CONDEMNED LAND HAVING BEEN LITIGATED IN STATE COURT IS RES JUDICATA. THE FACTS ALLEGED TO HAVE OCCURRED AFTER THE STATE DETERMINATION ARE INSUFFICIENT TO STATE A FEDERAL CLAIM. MOREOVER, EVEN ASSUMING A FEDERAL CLAIM IS STATED, NO BASIS IS PRESENTED FOR GRANTING THE RELIEF REQUESTED, RESTORATION OF POSSESSION.

(1)

After having failed to persuade the Supreme Court, the Appellate Division and the Court of Appeals to void their agreement, appellants came to federal court to start all over again, positing federal jurisdiction on the self-same constitutional question that was disposed of by the Appellate Division and characterized by the Court of Appeals as not constituting a substantial constitutional question (144-145).

This Court in Thistlethwaite v. City of New York, 497 F. 2d 339 (2nd Cir., 1974), cert. den. 419 U.S. 1019 (1974), reiterated the settled rule (341):

> "that since there is no doubt that state forums can be appropriate for the determination of issues arising under the federal constitution, if an issue is argued before a state tribunal, its resolution at that level carries with it all the usual effects of res judicata required by full faith and credit."

See also, Hutcherson v. Lehtin, 485 F. 2d 567 (9th Cir., 1973); American Surety Co. v. Baldwin, 287 U.S. 156 (1932); cf. Lombard v. Board of Education, 502 F. 2d

631 (2nd Cir., 1974). Thus, the only claim that might possibly be relevant to federal jurisdiction, the City's alleged inability to pay an award, unquestionably has been disposed of in State Court and is therefore barred from relitigation in federal court under the doctrine of res judicata.

In a transparent attempt to avoid this bar, appellants amended their complaint by adding thereto accusations of a conspiracy on appellees' part to compel appellants to forfeit their rides without compensation,* which conspiratorial acts first occurred at the very moment the State proceedings had been concluded (7-8; App. Br., p. 4).

The central theme of these after-occurring conspiratorial acts is the City's alleged unlawful refusal to pay relocation expenses where such payments allegedly had been made to others in similar circumstances (7,17). This, according to appellants, constitutes an unconstitutional deprivation of equal protection (7; App. Br. p. 6).**

*As previously noted, the condemnation court held the rides on the former City land to be personal property of appellants for which payment was not required. Presumably, the trial as to the portable rides on the former fee land will result in the same determination of non-compensability (53-56).

**Appellants have failed to inform this court that a proceeding had been pending in Supreme Court for relocation expenses and that their petition was dismissed for failure to exhaust administrative remedies. Matter of MHG Enterprises Inc. (City of New York), supra, NYLJ, June 11, 1976, p.7 Col. 2 (Sup. Ct., N.Y. Co., Tierney, J.).

Appellants elaborate with further allegations: a complaint concerning amusement ride safety filed by the director of PDC with the Housing and Development Administration (170), a complaint concerning improper sale of food in the amusement park and HDA's refusal to issue a "place of assembly" permit (168). According to appellants, this "conspiracy" gives rise to a new federal cause of action under 28 USC §1331 and against PDC under 28 USC §1343 and 42 USC §1983, which cause of action is not barred by the prior State proceedings (App. Br., p. 2).

Even assuming that alleged new cause of action is not precluded, federal jurisdiction is lacking.* Appellants' claimed right to relocation expenses turns on the nature of their tenure in the land (permittees, squatters, former fee) and, when determined, whether Administrative Code §1160-1.0 (7 Williams Press, 1975 Ed., p. 632) authorizes such payment. It does not arise under nor involve interpretation of the constitution or of federal statute. In Screven County v. Brier Creek Hunting and Fishing Club, 202 F. 2d 369 (5th Cir., 1953), the Court said:

> "Where jurisdiction is asserted to exist on the basis of a federal

*It should be noted that Judge Castaldi, in his decision on appellants' motion for possession found that "to the very moment of writing this opinion... there has been no significant change of circumstances that would warrant the court to vacate or modify its order of March 19 [granting the City possession]". In Re City of New York (College Point Industrial Park Urban Renewal 2), supra, NYLJ, July 6, 1976, p. 11 col.5.

> question, the question must be a substantial one and must form an integral part of the complaint. A mere incidental or collateral federal question may appear, or may lurk in the background of the record, but this is not a sufficient or adequate basis upon which federal jurisdiction may attach."

While it is doubtful that a federal question "may lurk in the background" here, if it does, it is clearly not an "integral part of the complaint."

As to the "conspiratorial" acts of the City, they have not the remotest bearing on a claimed deprivation of constitutional rights and, even if they did, they are insubstantial. We give but one illustration, the complaint as to ride safety, which resulted in nothing more than an inspection of the rides (170).

(2)

In a half-hearted attempt to avoid application here of the doctrine of res judicata to any part of their present, amended complaint, appellants' cite Guam Investment Co. v. Central Building, Inc., 288 F. 2d 19 (9th Cir., 1961), which held that res judicata is not a proper basis for a Rule 12(b) motion (288 F. 2d at 24) and in addition, that in order for summary judgment to be properly granted on this basis the applicability of the doctrine should appear on the face of the complaint or the record of the prior case should be placed in evidence (id.).

On a number of grounds this argument should be rejected. First, the complaint itself indicates that there was a prior adjudication, and thus this is a proper case for a Rule 12(b)(6) motion. See Southard v. Southard, 305 F. 2d 730 (2d Cir., 1962). Second, we submit that sufficient of the record of the State proceedings was before the District Court to enable it to pass on this issue under the final sentence of Rule 12(b), i.e. treating the motion as one for summary judgment under Rule 56. Third, appellants did not oppose the motion on this ground and thus they should not be heard on appeal to urge this most hypertechnical objection. Cf. Iacaponi v. New Amsterdam Casualty Co., 379 F. 2d 311 (3rd Cir., 1967).

Aside from some general statements, appellants do not here question the prior adjudication, asserting only that acts occurring after such determination gave rise to a new federal cause of action (App. Br., pp. 4-6, 9-10). In Guam, federal jurisdiction was unquestioned, at bar, appellants' allegations concerning an after-occurring conspiracy, on their face, cannot confer such jurisdiction (See ante, pp. 10-11 and App. br., pp. 4-5).

(3)

Even assuming appellants' amended complaint might be sufficient to allege a federal cause of action based on the complained of "conspiratorial" acts subsequent to the State proceedings, it still does not follow that appellants are entitled to restoration to possession. Insofar as any of the appellees might be considered "persons" within the meaning of Section 1983, or otherwise here amenable to suit, it seems obvious that a sufficient remedy by way of damages is available. Under no view does the complaint present a basis for interference with State condemnation proceedings, representing one of the most fundamental powers of sovereignty and essential to the orderly functioning of state and local governments. See, e.g., Brown v. Pearl River Valley Water Supply Dist., 292 F. 2d 395, 398-399 (5th Cir., 1961). As this is the only relief which appellants here seek, on this ground as well the complaint was properly dismissed.

CONCLUSION

The judgment should be affirmed, with costs.

July 9, 1976.

Respectfully submitted,

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STATE OF NEW YORK :
SS:
COUNTY OF NEW YORK:

Fred GORDON

being duly sworn, says that on the 9 day of JULY, 1976
at No. 551 - 5TH AVE. in the Borough of MANH, in NEW YORK CITY, he
served ~~a copy~~ 3 COPIES of the annexed APP. BRIEF upon ~~SQUADRON, ELLENOFF, PLESENT~~ Esq
the Attorney for the PLTFFS-APPELLS. in the within entitled action,
by delivering a copy of the same to a person in charge of said Attorney's office,
and leaving the same with him.

Sworn to before me this 9 :
day of JULY, 1976

Fred Gordon

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1786
Commission Expires May 1, 1978

Bruce Garner